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No. 395

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

EL PASO ELECTRIC COMPANY, *Appellant,*

v.

ROBERT S. CALVERT, et al., *Appellees.*

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

MOTION TO DISMISS

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Appellees, pursuant to Rule 16 (1) (a) of the Revised Rules of the Supreme Court of the United States, move to dismiss on the ground that the question presented is so unsubstantial as not to need further argument.

A. QUESTION PRESENTED

Whether an occupation tax levied by the State of Texas on a privately owned public utility serving incorporated cities in Texas with electric power violates the Commerce Clause of the United States Constitution, when the source of such power is from a generating plant located within the State of Texas and one within the State of New Mexico.

B. STATUTE INVOLVED

Article 11.03, Title 122A, Taxation-General, Revised Civil Statutes of Texas, is the statute involved in this appeal. The statute is printed in Appendix A, *infra*, pp. 14-16.

C. STATEMENT

This litigation concerns the business activities of a privately owned public utility operating in Texas and the applicability of certain state occupation taxes thereto. Appellant serves several Texas cities, including the incorporated cities of El Paso, Anthony, and Van Horn, Texas, with electric power. In addition, it serves some outlying areas in Texas and New Mexico.

The Company has two generating plants: one located near Anapra, New Mexico, known as the "Rio Grande Station," and the other located near Newman, Texas, in the State of Texas, known as the "Newman Station." The company also owns and operates a system of transmission lines, transformer stations, and other equipment used in distributing electric energy for sale at retail and wholesale rates, some of which equipment is located within the city limits of El Paso, Anthony, and Van Horn, Texas.

Part of the power sold by Appellant in Texas is generated in New Mexico at the Rio Grande Station, the

remainder is generated in Texas at the Newman Station.

During a portion of the period for which the tax was paid under protest, said protest period being from April 1, 1963, to April 1, 1964, the electric energy produced in Texas and New Mexico varied from month to month, as well as the electric energy purchased by Appellant for resale also varied. Some of Appellant's customers come within the provisions of Article 11.03, *supra,* which requires that Appellant pay an occupation tax based on the gross receipts received from such business done in certain sized cities or towns. The tax is graduated, depending upon the population of said city or town. The tax reaches only the sales of electricity in incorporated cities in the State of Texas. Receipts from sales which are made in other states are not taxed. Neither are receipts from sales in non-incorporated areas of the State of Texas taxed.

D. ARGUMENT

The issue in this case is clear. It is whether the Appellant is liable for the state occupation tax levied on the operation of a public utility company in cities covered by the applicable statute within the State of Texas. The changing of the name of the tax by the Appellant, the inclusion of an old repealed New Mexico tax in the "Question Presented" cannot convert the issue into one warranting review by this Court on Appeal.

The matter subject to taxation is one strictly between the State of Texas and one of its taxpayers, covering the operation of a particular business within the State. No Federal Question is involved, and the mere fact that a portion of the electric power sold by Appellant within the State of Texas has its source in New Mexico

does not present a substantial Federal Question for review. The facts clearly show that the source of such portion is merely incidental to the operation of the utility companies within the State of Texas.

The State of Texas, in its sovereign power, can impose a tax upon the act of carrying on a particular business (such as Appellant is engaged in) within the confines of its own state. *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 (1939); *Ficklen v. Shelby County Taxing District,* 145 U.S. 1; *American Mfg. Co. v. St. Louis,* 250 U.S. 459; *United North & South Development Co. v. Heath,* 78 S.W. 2d 650; *International Harvester Co. v. Evatt Tax. Comm.,* 329 U.S. 416 (1947).

In *Missouri v. Kansas Gas Co.,* 265 U.S. 298 (1924), it was held:

> "In the absence of congressional legislation, a State may constitutionally *impose taxes,* enact inspection laws . . . although they may have an incidental effect upon commerce." (Emphasis added.)

The public utility business operated by the Appellant in the cities of El Paso, Anthony, and Van Horn, Texas, constitute a sizeable Texas business operation, and are subject to the sovereign power of the State of Texas.

In the case of *East Ohio Gas Co. v. Tax Comm.,* 283 U.S. 465 (1931), this Court had before it a tax, being imposed on corporations engaged in the business of supplying gas for light, heat or power in the State of Ohio, at the rate of 1.35 per cent of all gross receipts on its intrastate business. The Appellant in the *Ohio* case furnished to some communities gas exclusively from outside the State of Ohio, to some gas only from Ohio, and to others a mixture of that from West Vir-

ginia and Ohio. The facts in the cited case are precisely the same as those that exist in the instant case.

This Court said in the *Ohio* case:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U.S. 330, 338. New Jersey Tel. Co. v. Tax Board, 280 U.S. 338, 346. And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. Sprout v. South Bend, 277 U.S. 163, 170-171 and cases cited."

The last paragraph of the *Ohio* case clearly covers the instant case in every respect when it says:

> "The Ohio statute does not purport to affect interstate commerce. The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

In the instant case, Appellant enjoys and exercises the privilege of operating public utility companies in three (3) Texas cities. If, for any reason, it discontinued its operation in these cities, nothing would prevent it from continuing to transmit electric energy from New Mexico into Texas, across a part of Texas, and then from Texas back into New Mexico. It could be accomplished by merely pulling a switch at the transformer stations that connect the transmission

lines with the local stations, and thereafter Appellant would not be subject to the tax imposed by Article 11.03, *supra.*

The facts in the *Ohio* case, above discussed, and those in the instant case being so precisely in point, and the tax imposed meeting the tests laid down by this Court, clearly demonstrate that the judgment below is correct.

The operation of a local business within a state and its relation on interstate commerce has been passed on by this Court on several different occasions.

In *Missouri v. Kansas Gas Co.,* 265 U.S. 298 (1924), it was held:

> "The business of supplying, on demand, local consumers, *is local,* even though the gas be brought from another state and drawn directly from its interstate mains; and this is so whether the local distribution be *made by the transporting company or by independent distribution companies.* In each case the *local interest is paramount,* and the interference with interstate commerce, if any, *indirect and of minor importance.*" (Emphasis added.)

In *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649 (1942), the company piped gas into the State and sold it to a distribution company with whom it had a partnership agreement concerning profits from the sale to the consumer. This Court held:

> "This Court has often had occasion to rule that the retail sale of gas at the burner tip by one who pipes the gas into the State, or by a local distribution company acquiring the gas from another similarly brought it into the State, is subject to state taxation and regulation."

In 1940 this Court decided the very important *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, which dealt with a gross receipts tax upon the sale

of tangible personal property other than gas or electricity. The property had been shipped into the taxing State by the seller and distributed directly to local purchasers. This Court, following many of the cases already cited, found that the sale to the ultimate consumer was a local business and was subject to the gross receipts tax even though the sale was in interstate commerce. Neither the fact that Berwind-White transported the goods in interstate commerce, nor the fact that sales may have been made in states other than the taxing state kept the seller's activities from being local rather than national in nature.

This Court said:

> "Nor is taxation of a local business or occupation which is separate and distinct from the transaction or intercourse which is interstate commerce, forbidden. . . ."

As is being pointed out, Appellant's business of local sale and distribution is separate and distinct from its business of transmitting electricity between the various states, which latter business only is national in character and beyond the reach of State taxation.

The Courts find no distinction between the local activity in *Berwind-White* and the local activity of distributing electricity. Both activities are essentially local and not national in character for tax purposes and the Courts have drawn analogies between the two types of distribution. *Utah Power and Light v. Pfost,* 286 U.S. 165 (1932); *International Harvester Co. v. Indiana,* 322 U.S. 340 (1944); and *Broad River Power Co. v. Query,* 60 F. 2d 544 (1942).

It is clear that the State of Texas has acted within its constitutional power to tax the business of a public utility company operating in the State of Texas, even

though some of its electric energy crosses the State line. This Court aptly stated the underlying principle in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445 (1940) when it said:

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society.
>
> ". . . The simple but controlling question is whether the State has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

Petitioner herein enjoys the privilege of carrying on a public utility business in one of our State's larger cites, as well as in the surrounding area. From the record it appears that the business is a very profitable one. It has received and is enjoying the benefits from such business.

The full protection of the State of Texas and all its power is available to Appellant. Appellant's opportunities in this business are unhampered by the State of Texas.

The occupation tax levied by the State of Texas is measured by the gross receipts *from the sale of electricity within an incorporated city or town in the State*

of Texas without regard to the next preceding source of such commodity. There is no attempt to increase the tax liability of any company because of its activities in interstate commerce and the cost of the company's interstate commerce is not increased by the tax levied to any greater extent than is the cost of a purely intrastate business.

In upholding the gross receipts tax upon the sale of goods which the seller shipped into the taxing state in interstate commerce, in *McGoldrick v. Berwind-White Coal Mining Co., supra,* pages 57 and 58, this Court went on to say:

> "Finally, it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state.
>
> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity, which, apart from its effect on the commerce, is subject to the state taxing power."

Of course, the gross receipts tax in the *Berwind-White* case was of the same nature and character as the tax here involved. It was so held in *International Harvester Co. v. Indiana,* 322 U.S. 340 (1944).

> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than their descriptive labels we must acknowledge that the sales tax sustained in the Berwind-White case was, in form, *imposed upon the gross receipts from an interstate commerce sale."* (Emphasis added.)

The facts in the *Berwind-White* case are *exactly parallel* with the facts in this case. Berwind-White brought its product into the taxing state from another state for